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CHURCH AND STATE: HOW MUCH SEPARATION?

ROBERT G. WECLEW

THE FEDERAL CONSTITUTION makes no mention of "separation of Church and State." There are only three sections of the Constitution which concern themselves with religion. The first amendment says: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, . . ." A religious test may not be required as a qualification to any office or public trust under the United States.¹ "If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, . . ."²

The phrase, "separation of Church and State," found its first expression in American constitutional case law in 1878 in a case involving religious freedom in the practice of polygamy.³ It did not involve the establishment section of the first amendment. The Court quoted Thomas Jefferson who in reply to a communication from the Danbury Baptist Association had taken occasion to say:

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting the estab-

¹ U.S. CONST. art. VI, § 3.

² U.S. CONST. art. I, § 7.

³ *Reynolds v. United States*, 98 U.S. 145 (1878).

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lishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights. . . .⁴

"Separation" attained an absolute quality in 1946 when the Supreme Court held:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."⁵

The "wall of separation" metaphor attained its greatest force in 1948 when the Supreme Court for the first and only time denied the right of a subdivision of a state to aid religious education, the Court finding that the use of the state's compulsory attendance law and public school buildings by religious groups in furtherance of a released time program violated the first amendment establishment clause which is part of the "liberty" of the fourteenth amendment due process clause.⁶ In a 1952 case the Court permitted a released time program for religious education off the school premises but upheld the principles of *Everson v. Board of Educ.* and *McCormack v. Board of Educ.* when it said: "We follow the *McCormack* case."⁷

Is the "wall" impenetrable and fixed or is it permeable and lacking in definite boundaries? Can the absolutist position be justified and apparent exceptions explained on the ground that they do not conflict with the absolutist position? Or is that position untenable? The issue is most current, as witness, for example, the controversy under the recent Federal Aid to Education proposals.⁸ Also witness the revival

⁴ *Id.* at 164.

⁵ *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947).

⁶ *Illinois ex rel. McCormack v. Board of Educ.*, 333 U.S. 203 (1948).

⁷ *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).

⁸ *Hearings on Bills to Provide Federal Assistance to States for Elementary and Local Schools Before the Subcommittee on Education of the Senate Committee on Labor and*

of "the religious issue" in national politics following Catholic John F. Kennedy's nomination for President.⁹

Five positions in the inter-relationship between Church and State may be considered in connection with establishment of religion: (1) Government gives its full support and authority to making a particular religious sect the state religion, as in England; (2) Government grants a preference to one or more sects; (3) Government aids all religions; (4) Government co-operates with all religions; (5) Government assumes an attitude of absolute neutrality toward all religions. There is very little responsible support for Government's doing (1) or (2) in this country. It has been argued that Government's maintaining an attitude of absolute neutrality, (5), is in effect being "neutral in favor of" secularism as opposed to religion and in effect is assistance in the establishment of a state religion of secularism.¹⁰ In addition, absolute neutrality in our pluralistic society would violate the freedom clause of the first amendment in many instances. Absolute neutrality is virtually impossible. The real problems are in (3) and (4), and to a lesser degree in (5).

"We are a religious people whose institutions presuppose a Supreme Being."¹¹ Our history, case law, statutes, customs and traditions reflect frequent recognition of, co-operation with, and direct, indirect, and incidental aid to religion and to religion's supporters. Our Declaration of Independence includes the words "God," "Creator," "Supreme Judge of the World," and "Divine Providence." The Northwest Ordinance of 1787, part of the organic law of our country, contains the following relevant provision regarding religion: "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."¹² At this time schools were private and mainly religious.

Madison and Jefferson, who had considerable to do with the draft-

Public Welfare, 86th Cong., 1st Sess. 508, 527 (1959); *Hearings on H.R. 22, School Support Act of 1959, Before a Subcommittee of the House Committee on Education and Labor*, 86th Cong., 1st Sess. 552, 557 (1959).

⁹ Life, Sept. 12, 1960, p. 32; Newsweek, Sept. 12, 1960, p. 61.

¹⁰ Chandler, Book Review, 14 LAW & CONTEMP. PROB. 164, 166 (1949); Herberg, *Justice for Religious Schools*, 98 AMERICA 190 (1957).

¹¹ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

¹² July 13, 1787, 1 Stat. 52, art. III.

ing and passage of the first amendment, were not opposed to co-operation with religion. Madison's initial recommendation regarding that amendment was as follows: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed."¹³ Jefferson's record does not show opposition to aid and co-operation despite the fact that he authored the "wall of separation" slogan.

The young men who designed the government of the United States . . . saw no walls separating science, philosophy, religion and art. . . . Jefferson in particular sought to rescue religious belief from the kind of state sponsorship or entanglement that frequently lead to injustice and discrimination. His argument was not against faith but against monopoly and political power under religious auspices.¹⁴

That Jefferson did not equate support of religion or religious education with establishment is indicated by his use of United States funds for chaplains in the Army and Navy and in Congress, and for religious education among the Indians, and his recommendation to the University of Virginia of a theological school, a room for religious worship, and arrangements for religious instruction to students.¹⁵

That the wall of separation is "low and fluid" is the opinion of one constitutional law scholar, well expressed as follows:

That bloodstream must be kept separate by the walls of the circulatory system. A break in them is disastrous. And yet the blood performs its living function only as it nourishes the whole body, giving health and vigor to all its activities. It is some such . . . [expression] as this which seeks expression in Jefferson's "wall of separation." But men who claim to follow him have transformed his figure into one of mechanical divisions and exclusions.¹⁶

One of the greatest constitutional law authorities, Justice Story, did not mistake establishment for aid when he said:

The real object of the [first] amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.¹⁷

¹³ 1 ANNALS OF CONG. 434 (1789-1791).

¹⁴ Cousins, *What the Founding Fathers Believed*, The Saturday Rev., Mar. 22, 1958, pp. 15, 17.

¹⁵ O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 200 (1949); Editorial, "No Law but Our Own Prepossessions"? 34 A.B.A.J. 482 (1948).

¹⁶ Meiklejohn, *Educational Cooperation between Church and State*, 14 LAW & CONTEMP. PROB. 61, 69 (1949).

¹⁷ STORY, COMMENTARIES ON THE CONSTITUTION § 1877 (5th ed. 1891).

The purpose of the first amendment was to leave the establishment of religion within the sphere of the states. When the Bill of Rights was adopted, five states had established Protestant churches. It was not until 1833 that the last of these state-supported churches lost its favored position, indicating that the amendment was neither for nor against establishment in the states. Since Congress could make no law concerning establishment, a religion could not be set up by Congress for the entire nation, and Congress could not legislate for or against religion in the states.¹⁸ The amendment's real importance lay in the separation created between state and federal spheres, and not in the matter of separation of Church and State.¹⁹ The members of the Constitutional Convention of 1787 desired assurance that the federal government would not set up a national church nor interfere with the various types of establishments, quasi-establishments and church government arrangements then existing in the various states.²⁰ The purpose of the first amendment was to prohibit any federal law either for or against one religion or one religious group.²¹ It was a problem in federalism, the states being concerned with interference with their sovereignty by affirmative action establishing a national religion or by negative action disestablishing their states' establishments. Establishment read in conjunction with the tenth amendment was a reservation of power to the states.²²

In 1833 it was held that the Bill of Rights applies only to the federal government.²³ After adoption of the fourteenth amendment in 1868 doubt arose as to the amendment's application to state religious establishments. Accordingly, Senator Blaine in 1876 introduced a resolution for a constitutional amendment providing:

No state shall make any law respecting a religious establishment or prohibiting the free exercise thereof; and no money raised by taxation in any state for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect

¹⁸ O'Neill, *Nonpreferential Aid to Religion Is Not an Establishment of Religion*, 2 BUFFALO L. REV. 242 (1953).

¹⁹ Corwin, *The Supreme Court as a National School Board*, 14 LAW & CONTEMP. PROB. 3, 14 (1949).

²⁰ O'BRIEN, JUSTICE REED AND THE FIRST AMENDMENT 129 (1958).

²¹ O'NEILL, CATHOLICISM AND AMERICAN FREEDOM 43 (1952).

²² Snec, *Religious Disestablishment and the Fourteenth Amendment*, 1 CATH. LAW. 301, 318 (1955).

²³ *Barron v. Baltimore*, 32 U.S. (7 Pet.) 242 (1833).

or domination nor shall any money so raised or lands so devoted be divided between religious sects and denominations.²⁴

In 1925 it was held that freedom of speech and press are among the fundamental personal rights and liberties protected by the due process clause of the fourteenth amendment against infringement by the states.²⁵ In 1940 it was held that the fourteenth amendment embraced freedom of religion of the first amendment, and a dictum indicated it embraced establishment.²⁶ The *Everson* case in 1946 made the establishment clause of the first amendment applicable to the states by way of the fourteenth amendment.²⁷

It is easy to see how freedom of speech, religion, press, and assembly have been interpreted as "liberties," but difficult to view establishment in the same way. Corwin expresses this view when he says: "So far as the Fourteenth is concerned, states are entirely free to establish religions provided they do not deprive anyone of religious liberty. It is only liberty that the Fourteenth protects."²⁸ Snee expresses the same thought when he says:

If Madison and the other framers of the first amendment considered the establishment clause to be anything more than a reservation of power to the states, it was as a political duty imposed upon the federal government. Even if meant as an additional safeguard to religious freedom from federal encroachment, it does not thereby become a constitutional right of a citizen. Hence, however wise the additional safeguard may be, it is not in itself a liberty, and certainly is not so fundamental as to be "implicit in the concept of ordered liberty" protected by the Fourteenth Amendment.²⁹

THE CASES

Cases decided by the various state courts indicate a hopeless division as to what practices violate establishment and why. The cases below are mainly United States Supreme Court cases, with some state cases which indicate a line of reasoning the federal high court could use without violating establishment. The cases below are intended to be illustrative rather than exhaustive.

In the first important case concerning establishment to come before the Supreme Court, the Court said:

²⁴ 4 CONG. REC. 5580 (1876).

²⁵ *Gitlow v. New York*, 268 U.S. 652 (1925).

²⁶ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

²⁷ *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

²⁸ Corwin, *supra* note 19, at 19.

²⁹ Snee, *supra* note 22, at 318.

Yet it is difficult to perceive . . . that the legislature may not enact more laws to effectually enable all sects to accomplish the great objects of religion, by giving them corporate rights for the management of their property. . . . [T]he legislature could not create or continue a religious establishment which should have exclusive rights. . . . But the free exercise of religion cannot be justly deemed to be restrained, by aiding with equal attention the votaries of every sect to perform their own religious duties, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead.³⁰

The case concerned itself with the Virginia Constitution rather than the first amendment. It was, of course, decided before the passage of the fourteenth amendment and illustrates the wide power the states had to aid religion. The point of reference is religious freedom.

In the next significant case the Court had this to say: "The law knows no heresy and is committed to the support of no dogma, the establishment of no sect."³¹ Two rival factions were both claiming church property in this case, and the Court was concerned only with what body in the sect was entitled to make the decisions, and not with what decisions it made. The decision made by the highest body in the church itself was the one sustained. In *Kedroff v. St. Nicholas Cathedral*³² the Court reached substantially the same result in a suit coming up from a state court involving two factions of the Russian Orthodox Church. A New York statute had the effect of transferring the administration of the church from one group to another. Although separation was mentioned, the Court rested its decision on free exercise. This would seem to support a view that the establishment section, especially with reference to state action, complements the religious guarantee and operates strictly or loosely only insofar as religious freedom would be advanced,³³ and is a political decision insuring religious liberty.³⁴

In *Millard v. Board of Educ.*³⁵ a local board of education rented space in the basement of a church. A school was operated in the basement of the church with all Catholic students and all Catholic teachers. The pupils under the direction of a priest attended Mass each morning before school. The Illinois court said the local board had the

³⁰ *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815).

³¹ *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1871).

³² 344 U.S. 94 (1952).

³³ O'BRIEN, *op. cit. supra* note 20, at 186.

³⁴ Costanzo, *Federal Aid to Educ. and Religious Liberty*, 36 U. DET. L.J. 1, 6 (1958).

³⁵ 121 Ill. 297, 10 N.E. 669 (1887).

right to rent of any person who had property suitable for public purposes, that the school authorities could select teachers who belonged to any church or no church so long as they exercised the essential elements of control, and compulsion to attend Mass was on the part of the religious authorities and not the state. The case indicates that the state does not have to refrain from doing business with a religious group merely because it is a religious group,³⁶ and that discrimination in hiring a teacher because of her religion would violate her religious freedom. The state cannot adopt a position which places religion in a position where it has no rights which the law must protect.³⁷

In *Dunn v. Chicago Training School for Girls*³⁸ taxpayers filed suit to restrain payment of amounts the county had appropriated for care of girls committed to sectarian institutions. Payments to the school consistently ran less than what it actually cost to maintain the girls. The court here upheld the benefit to be paid on the grounds that religion cannot be excluded from all incidental benefits, value was received, and the county was the beneficiary since payments were at less than cost. No preference was found. The girls could not be excluded from religious services merely because the county assumed control over them. This would be an instance where complete separation would restrain religious freedom. It is an area where the state assumes a maximum degree of control over individuals as in prisons and in the armed forces, where it furnishes them with chapels and chaplains. Freedom of religion requires state co-operation and assistance in these instances. Where aid is expressed in terms of separation it arouses controversy, but if it is understood that co-operation and aid may be given to individuals to avoid restraining their religious freedom, confusion and controversy lessen.³⁹

In *Davis v. Beason*⁴⁰ the Court held that neither free exercise nor establishment protects one who violates the criminal laws of the nation. The Court held that "the First Amendment . . . in declaring that Congress shall make no law respecting the establishment of religion . . . was intended to . . . prohibit legislation for the support of any reli-

³⁶ *Accord*, *Schade v. Allegheny County Inst. Dist.*, 386 Pa. 507, 126 A. 2d 911 (1956).

³⁷ Cushman, *Public Support of Religious Education in American Constitutional Law*, 45 ILL. L. REV. 333, 348 (1950).

³⁸ 280 Ill. 613, 117 N.E. 735 (1917).

³⁹ Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 428-429 (1953).

⁴⁰ 133 U.S. 333 (1890).

gious tenets, or the modes of worship of any sect.”⁴¹ Here we clearly see preference of one sect as the prohibition intended.

*Church of the Holy Trinity v. United States*⁴² affirms and reaffirms that this is a religious nation. Herein are numerous instances of religious customs and observances to which the state is a party. In addition, the case operates to exempt ministers from a federal labor law designed to prevent the influx of unskilled labor into this country, no imputation being found to include ministers within the law. *Murdock v. Pennsylvania*⁴³ found that the selling of religious tracts could not be licensed by a city. This, however, was on the basis of freedom of religion, the Court finding that the “state may not impose a charge for the enjoyment of a right granted by the Constitution.”⁴⁴

Without referring to the establishment clause which, of course, had not as yet been held absorbed into the fourteenth amendment, the Supreme Court in *Petit v. Minnesota*,⁴⁵ speaking of a Minnesota law which barred all labor except works of charity and necessity on Sundays, said:

We have uniformly recognized state laws relating to the observance of Sunday as enacted in the legitimate exercise of the police power of the State. . . . [I]t was within its [the legislature’s] discretion to fix the day when all labor within, the limits of the State . . . should cease.⁴⁶

In another “Sunday Closing” law case a New York statute prohibited selling on Sunday except in certain cases.⁴⁷ Defendants were convicted of selling uncooked meat in violation of the law. The court had this to say:

It is not a “law respecting an establishment of religion, or prohibiting the free exercise thereof.” . . . It does not set up a church, make attendance on religious worship compulsory, impose restrictions upon expression of religious belief, work a restriction upon the exercise of religion according to the dictates of one’s conscience, provide compulsory support, by taxation or otherwise, of religious institutions, nor in any way enforce or prohibit religion. Although the so-called Sunday laws may be said to have a religious origin, our statute . . . has also recognized that the first day of the week by general consent is set apart “for rest” in accord with the general experience of mankind that it is wise and necessary to set apart such a day . . . for both the physical and moral welfare of the . . . community.⁴⁸

⁴¹ *Id.* at 342.

⁴⁴ *Id.* at 113.

⁴² 143 U.S. 457 (1892).

⁴⁵ 177 U.S. 164 (1900).

⁴³ 319 U.S. 105 (1943).

⁴⁶ *Id.* at 165.

⁴⁷ *People v. Friedman*, 302 N.Y. 75, 96 N.E. 2d 184 (1950), *appeal dismissed*, 341 U.S. 907 (1951).

⁴⁸ *Id.* at 79–80, 96 N.E. 2d at 186.

*Bradfield v. Roberts*⁴⁹ gave a narrow construction to the establishment clause, holding that financial assistance to a secular corporation all of whose incorporators and officials are members of a particular faith, is not synonymous with establishing a religion. Title to hospital property was in this case in the Sisters of Charity, a Roman Catholic organization, and these sisters operated the hospital, which was incorporated by act of Congress and was located in Washington, D.C. An appropriation was made for the construction of isolation buildings, and the District of Columbia commissioners entered into an agreement with the hospital corporation to carry the appropriation into effect. The Court found that there was no conflict with the establishment clause. The religious opinions of the incorporators and members were held not subject to inquiry. A 1949 case decided by the highest Kentucky court is to the same effect;⁵⁰ the court there held that the fact that all members of a hospital board were members of one religion did not mean that money given to the hospital under the Hospital Survey and Construction Act of 1946 (42 U.S.C.A. §291) was money given to a particular denomination and that the test was not who received the money but the character of the use.

From 1819 to 1899 Congress appropriated money to religious groups to maintain sectarian schools among the Indians. This was part of the civilizing process which promoted greater public security. When the Indians ceased being a menace, and only then, was there a concern that the government was aiding religion.⁵¹ It wasn't until 1908 that a case⁵² came before the Supreme Court attempting to test the constitutionality of appropriations of this type. The Court held that when Congress finally decided not to appropriate funds for Indian sectarian schools this applied only to public moneys raised by general taxation, and did not prevent the expenditure of Indian treaty and trust funds for maintenance of sectarian schools. To hold otherwise would violate the free exercise of religion.

In 1908 the Court considered the status of the Roman Catholic Church in territories acquired from Spain and held that the Church had the same capacity to acquire and hold property and sue and be sued in Puerto Rico that it had under Spanish law as the sole state

⁴⁹ 175 U.S. 291 (1899).

⁵⁰ *Kentucky Building Comm'ns v. Effron*, 310 Ky. 355, 220 S.W. 2d 836 (1949).

⁵¹ Cushman, *supra* note 37, at 334.

⁵² *Reuben Quick Bear v. Leupp*, 210 U.S. 50 (1908).

recognized church.⁵³ The case involved federal action regarding religious establishment and even gave a preferred status to the Catholic Church since it was then the only religious body existing on the island.⁵⁴

Even though direct governmental assistance were given to religion it is difficult to see how such an appropriation could be attacked on the federal level in view of the holding that a taxpayer lacks sufficient interest to attack a federal appropriation.⁵⁵ The rule in *Frothingham v. Mellon* was applied in a suit by a citizen to enjoin the Treasurer of the United States from paying out moneys for salaries of chaplains of both houses of Congress and of the Army and Navy.⁵⁶ The plaintiff sued as a citizen rather than a taxpayer, alleging that the establishment clause was violated. The Court followed the *Frothingham* case in dismissing the suit and found that the interest of a citizen is no greater than that of a taxpayer. Accordingly, direct aid to religion was not disturbed.

A few cases will illustrate the justification for tax exemption. A 1951 Illinois case held:

The fundamental ground upon which all exemptions in favor of charitable institutions are based is the benefit conferred upon the public by them and a consequent relief, to some extent, of the burden upon the state to care for and advance the interests of its citizens.⁵⁷

The view has been taken that the furnishing of services through organizations of a charitable or educational nature such as orphanages, schools, and old peoples' homes, rather than the teaching of religion, justifies the state in recognizing the church's work.⁵⁸ Exemption granted under state law to a religious school was held not to violate the establishment clause, since the tax exemption was designed to promote the general welfare through encouraging education, and the benefit received by the religious group was incidental to the achievement of a public purpose. The court found that even if the exemption was of benefit to religious groups the first amendment was not vio-

⁵³ *Municipality of Ponce v. Roman Catholic Apostolic Church*, 210 U.S. 296 (1908).

⁵⁴ Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U.L.Q. 371.

⁵⁵ *Frothingham v. Mellon*, 262 U.S. 447 (1923).

⁵⁶ *Elliott v. White*, 23 F. 2d 997 (D.C. Cir. 1928).

⁵⁷ *People v. Rev. Saletyni Missionaries*, 409 Ill. 370, 377, 99 N.E. 2d 186, 190 (1951).

⁵⁸ Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation*, 14 LAW & CONTEMP. PROB. 144, 151 (1949).

lated, since the separation principle was not impaired by granting tax exemption to religious groups generally.⁵⁹ The Illinois high court in 1928,⁶⁰ in addition to recognizing that the legislature is the sole judge of exemptions necessary for school, religious and charitable purposes,⁶¹ and that authority to establish any religious denomination by charter is not granting a preference,⁶² held that exemption from taxes could extend to all property owned by a religious school even though not used solely for educational purposes.⁶³ The Supreme Court in *Helvering v. Bliss* found nothing wrong with the fact that "Congress, in order to encourage gifts to religious . . . objects granted the privilege of deducting such gifts from gross income. . . ."⁶⁴ This appears to recognize deliberate aid and encouragement to religion.

That there cannot be discrimination against a religious group merely because it is religious is illustrated in a recent 1958 New York case.⁶⁵ Plaintiffs, owners and tenants, sought to enjoin New York City from carrying out a renewal plan. Fordham University, a Roman Catholic school, intervened. It had agreed to buy two blocks of land at \$7.00 per square foot, relocate the occupants, and build school buildings. Under federal statutes (42 U.S.C.A. §§1450 *et seq.*), the federal government would pay two-thirds of the difference between what the city paid for the land and the amount for which it was sold. The city paid \$16.00 a foot. Plaintiffs said that the difference between \$7.00 and \$16.00 a square foot was an unconstitutional grant or subsidy of moneys to a religious corporation. The court found that the city was buying land and buildings and the school was buying the same buildings subject to its agreement to raze the buildings, relocate the tenants and use the cleared land for college buildings, and that this re-use value was less than \$7.00 per foot. Since any college could have bid, Fordham could not be excluded from bidding merely because it was a religious institution. The court found no gift or subsidy and no

⁵⁹ *Lundberg v. County of Alameda*, 46 Cal. 2d 644, 298 P. 2d 1 (1956), *appeal dismissed*, 352 U.S. 921 (1956).

⁶⁰ *Garrett Biblical Institute v. Elmhurst State Bank*, 331 Ill. 308, 163 N.E. 1 (1928).

⁶¹ *Id.* at 315, 163 N.E. at 3.

⁶² *Id.* at 316, 163 N.E. at 3.

⁶³ *Id.* at 317, 163 N.E. at 4.

⁶⁴ 293 U.S. 144, 147 (1934).

⁶⁵ *64th St. Residences v. City of New York*, 4 N.Y. 2d 268, 150 N.E. 2d 396 (1958), *cert. denied*, 357 U.S. 907 (1958).

aid to religion. Benefits could not be denied to religion merely because it was religion.

In considering the Selective Draft Law of May 18, 1917 (40 Stat. 76), which exempted ministers and theology students and relieved members of certain sects from military duty, the Court said:

And we pass without anything but statement the proposition that an establishment of religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act . . . because we think its soundness is too apparent to require us to do more.⁶⁶

The Supreme Court had the opportunity to pass on Bible reading in the public schools in the case of *Doremus v. Board of Educ.*,⁶⁷ but dismissed the appeal on the basis of lack of standing, since the student had graduated before the appeal was brought and the taxpayer lacked the requisite financial interest. Arguments advanced to justify Bible reading in the public schools are that the school boards and not the courts should decide what books should be read; that the Bible should be read as literature and history; that reading it without comment is not indoctrination; that children should all read the same books and no one person should be allowed to determine what the books should be; and that Bible reading is useful in spreading moral principles.⁶⁸ However, when it came to the distribution of Gideon Bibles in the school to those students whose parents consented, the court, a Jewish parent objecting, decided not that religion was favored but that aid was given to the Protestant religion, which in effect discriminated against the Jewish.⁶⁹

A most significant case arose in this general field in 1930 when a citizen and taxpayer of Louisiana sought to restrain the expenditure of state funds for the purchase of text books for students in private and parochial schools.⁷⁰ It was claimed that there was a taking of public property for a private purpose in violation of the fourteenth amendment. The Court set forth the "child benefit" or "welfare" theory which is now the basis for considerable welfare legislation regarding school children. The Court found that the purchase of the books was

⁶⁶ Selective Draft Law Cases, 245 U.S. 366, 389 (1917).

⁶⁷ 342 U.S. 429 (1952).

⁶⁸ Fellman, *Separation of Church and State in the United States: A Summary View*, [1950] Wis. L. Rev. 427, 451-452.

⁶⁹ *Tudor v. Board of Educ.*, 14 N.J. 31, 100 A. 2d 857 (1953), *cert. denied*, 348 U.S. 816 (1954).

⁷⁰ *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930).

not for a church or school but was for the use of the school child. The school children are the beneficiaries, and the state's taxing power is used for a public purpose.

The "child benefit" theory was well stated when the Mississippi court in 1941 said:

The religion to which children of school age adhere is not subject to control by the state, but the children themselves are subject to its control. If the pupil may fulfill its duty to the state by attending a parochial school it is difficult to see why the state may not fulfill its duty to the pupil by encouraging it "by all suitable means." The state is under a duty to ignore the child's creed, but not its need. It cannot control what one child may think, but it can and must do all it can to teach the child how to think. The state which allows the pupil to subscribe to any religious belief should not, because of the exercise of this right, proscribe him from benefits common to all.⁷¹

The President's Advisory Committee in 1938 found that education in nonpublic schools resulted in a substantial saving of public funds and that aid in the form of reading materials, transportation, scholarships, and health and welfare services should be made available to private school children.⁷²

In *Everson* the Court, while applying the wall of separation metaphor and holding establishment is a "liberty" under the fourteenth amendment,⁷³ did state that New Jersey would be hindering its citizens in the free exercise of their religion if it prevented them from receiving the benefits of public welfare legislation. The New Jersey tribunal in authorizing reimbursement for fares paid on buses by parochial students "applied the well-settled child-welfare doctrine—that is, the widely accepted idea that legislation is not void if it achieves a public purpose even though in doing so a private end is incidentally aided."⁷⁴

Three Supreme Court cases in the 1920's rested fundamentally on the right of a parent to control the education of his child, including the right to send him to a private or religious school as a part of "liberty" protected by due process.⁷⁵ One of the three cases, *Pierce v. Society of Sisters*, in addition recognized a secondary degree of

⁷¹ *Chance v. Mississippi State Textbook R. & P. Board*, 190 Miss. 453, 467, 200 So. 706, 710 (1941).

⁷² Report of the Advisory Committee on Education, Washington, 54, 86, 197 (1938).

⁷³ *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947).

⁷⁴ Drinan, *Everson Case: Ten Years After*, 96 AMERICA 524 (1957).

⁷⁵ *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Farrington v. Tokushige*, 273 U.S. 84 (1927).

state control over the child and a considerable degree of control over private, including religious, schools which could not exist if there were to be absolute separation. The *Pierce* Court said:

There is no question as to the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children attend some school, that all teachers shall be of good moral character and patriotic disposition, that certain subjects fairly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to public welfare.⁷⁶

But besides the three 1920 cases, the later case of *Illinois ex rel. McCollum v. Board of Educ.*⁷⁷ (mentioned earlier in this article) is worthy of consideration at this point. In the *McCollum* case a ten year old child suffered because he had to leave the room when he was confronted with religious teachings his parents disapproved. Religious instruction in particular faiths was given on school property by clergy or quasi-clergy. When the Court forbade this type of instruction because the child's feelings were hurt, it was a "disproportionate use of the great power of the Supreme Court of the United States and the Court backed away from it in *Zorach v. Clauson*."⁷⁸ There has to be some 'live and let live' in modern society."⁷⁹ Two million children in 2,200 cities were attending some type of religious instruction and "she [Mrs. McCollum] . . . obtained the aid of a judicial decree to suppress the teaching which was the very genesis of the freedom which she exercises for herself by trying to take it from others."⁸⁰ The decision, which in effect said the public schools must be secular and devoid of religion, raised a storm of criticism. Even the United States Attorney General criticized the decision as a distortion of the meaning of the first amendment.⁸¹ Was not the Court saying that "absolute separation" had become the first amendment's meaning as interpreted by the experience of the people?⁸²

In the abovementioned *Zorach* case, where the Court approved a released time religious instruction program off public school premises,

⁷⁶ *Pierce v. Society of Sisters*, *supra* note 75, at 534.

⁷⁷ 333 U.S. 203 (1948).

⁷⁸ 343 U.S. 306 (1952).

⁷⁹ SUTHERLAND, PUBLIC AUTHORITY AND RELIGIOUS EDUCATION IN STUDY OF RELIGION IN THE PUBLIC SCHOOLS 33, 51 (Brown, N.C. ed. 1937).

⁸⁰ 34 A.B.A.J. 482, 483 (1948).

⁸¹ PFEFFER, THE LIBERTIES OF AN AMERICAN 414 (1956).

⁸² Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROB. 23, 26 (1949).

the Court said: "The First Amendment . . . does not say that in every and all respects there shall be a separation of church and state. . . . Otherwise the state and religion would be aliens to each other—hostile, suspicious and even unfriendly."⁸³ The Court further stated:

We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedules of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. . . . The government must be neutral when it comes to competition between the sects. . . . Our individual preferences . . . are not the standard. . . . The problem, like many problems in constitutional law, is one of degree.⁸⁴

With the absolutist character of *McCullum* removed, the Court makes the problem one of degree with each case to be decided on its own facts. "The public policy and the individual gain must be balanced against the degree of union and the amount of aid to the particular sects."⁸⁵ Although *McCullum* is affirmed, its underlying philosophy is changed and the Court "has taken the position that the term 'aid' means that the Church and State may cooperate to serve the spiritual needs of the people providing such cooperation does not infringe the freedom of others to exercise their religion."⁸⁶ The point of reference is not establishment, but religious freedom for those who wish to learn more of their religion, as opposed to the religious freedom of those who do not.

McCullum allowed no encouragement or co-operation with religion, while *Zorach* does. *McCullum* requires indifference to religious groups, while *Zorach* does not. *McCullum* would seem to find any released time program violative of the First Amendment, as opposed to *Zorach*. *Zorach* did not repeat the definition of the First Amendment of *McCullum* which denied aid to all religions. Douglas's opinion in *Zorach* would allow the government to co-operate with and possibly even aid all religions impartially since "we are a religious people." Separation now calls for neutrality between religious groups,

⁸³ *Zorach v. Clauson*, 343 U.S. 306, 312 (1952).

⁸⁴ *Id.* at 313-314.

⁸⁵ Note, 33 B.U.L. REV. 68, 75 (1953).

⁸⁶ Reed, *Church, State and the Zorach Case*, 27 NOTRE DAME LAW. 529, 542 (1951-1952).

and not between religion and irreligion. Under the *Pierce* reasoning the state could release the child to his parents so that he could receive all his education in a sectarian school; *McColum* said this couldn't be done even for a short time; and *Zorach* went back to *Pierce*.

It is interesting to note that where use of public facilities was approved from the religious freedom standpoint, the Court forced a community to allow the use of its parks for the teaching of religion through use of a sound truck even though it disturbed those who didn't want to listen.⁸⁷ In *McColum* public property couldn't be used to teach willing persons in a program that was almost unanimously approved, establishment and not religious freedom being the point of reference.

It is probable that the philosophy of *Everson*, a 1946 case, and *McColum*, a 1948 case, were by-products of the preferred position philosophy emphasizing the firstness of the first amendment, which was accepted by a majority of the Court from 1943 to 1948, but not thereafter. Where firstness of the first amendment is emphasized the judicial starting point is a taint of presumptive invalidity, and not of presumptive validity.⁸⁸ The Court, having encompassed the other provisions of the first amendment within the fourteenth, and having given them preferred status, could have used *Everson* and *McColum*, where establishment was emphasized, to round out the first amendment. This is in opposition to Holmes' theory of federalism expressed as follows:

There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.⁸⁹

The Court may well have adopted the Holmes' philosophy in 1952 in *Zorach*, with the preferred position of the first amendment abandoned.

LAWS AND CUSTOMS

There are numerous laws, customs, and practices wherein religion in one or more aspects is aided directly, indirectly, or incidentally. It is the religious function itself that government cannot aid directly. Classification is important in determining whether a certain aspect of

⁸⁷ *Saia v. New York*, 334 U.S. 558 (1948).

⁸⁸ SCHWARTZ, *THE SUPREME COURT* 235-239 (1957).

⁸⁹ *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (dissenting opinion).

religion is entitled to public aid. "[A] church may receive police protection when classed as property, tax exemption when classed as a non-profit institution, sewage connection when classed as a building, and yet be denied financial aid when classed as a religious institution. . . ." ⁹⁰ However, there are two important precedents where direct payments have been made to religious schools, presumably because to refuse such payments would deny students equality of religious freedom in attending the schools of their choice: "The G.I. Bill of Rights," among its other provisions, provided for government supervision of standards of approved schools and for direct payments to church operated schools and seminaries for veterans choosing courses of training in those particular denominational schools. ⁹¹ Congressional pages are educated in public, private, or parochial schools, and private and parochial schools are reimbursed by congressional appropriation in the same amount Congress would pay the District of Columbia had the page decided to attend a public school. ⁹²

One author advocates a certificate plan under which the government would make direct money grants in the form of certificates to all parents of students attending approved private schools. The certificate would be valid when used in partial payment of tuition at any private school. He also advocates as an alternative a tax credit plan whereby a tax credit in a certain sum would be given to parents for each child attending a private school for whom tuition in excess of the tax credit is paid. The author says that this is not government aid because the subsidy is given directly to the parents, and the parents and the children are beneficiaries in that the child can attend the school of his choice. ⁹³ The solution lies in furnishing aid to the parents and child whereby they can set up such schools as they choose, providing that they conform with state requirements in turning out citizens educated in their civic duties. ⁹⁴ If the state's standards for education in the secular subjects are met by the religious school, "It is not aid to religion to apply tax funds toward the cost of such education in public and private schools without discrimination." ⁹⁵

⁹⁰ Cushman, *supra* note 37, at 348.

⁹¹ 58 Stat. 287 (1944).

⁹² 2 U.S.C.A. § 88a (Supp. 1959).

⁹³ BLUM, *FREEDOM OF CHOICE IN EDUCATION* 26 (1958); Consult Henle, *American Principles and Religious Schools*, 3 ST. LOUIS U.L.J. 237, 251 (1955) for a further statement regarding payment of fees in the name of the parent or child.

⁹⁴ Hays, *Law and the Parochial School*, 3 CATHOLIC LAW. 99, 107 (1957).

⁹⁵ Katz, *supra* note 39, at 440.

Since the state requires school attendance it is the state's duty to provide schools that do not violate the parents' conscience. To the degree that the state maintains neutrality regarding religion and creed it takes a theological position, since it assumes that religion has no real concern with everyday life. This assumption by the state is contrary to the beliefs of many. Certainly it is contrary to fundamental Catholic beliefs.⁹⁶ It is argued that nobody is compelled to send his child to a public school but may give him his education in any approved parochial school. This is equating immunity from government coercion and freedom from all government aid to religious freedom.⁹⁷

[I]f there is to be a symbol of democracy in education, it is not the public school as the single "democratic" school; rather it is (or would be) the coexistence of several types of schools, including church-affiliated schools, on a footing of judicial equality, with consequent proportionately equal measure of state encouragement and support. It would be an educational system pivoting on the parental duty as fully operative, not on a doctrinaire concept of "national unity."⁹⁸

Giving up the right to freedom of conscience cannot be the price extracted by the state for a public education. Denial of equal benefits to parent and child merely because of their religious beliefs is a form of discrimination. To say that no support of any kind may be given to religion would mean that "irreligion has been endowed and established as the national religion."⁹⁹ Since the state allows parents to send their children to nonpublic schools, it may not make their church affiliation a liability to their receipt of benefits granted for the general welfare of all citizens.¹⁰⁰ "The exercise of religious liberty must not become a liability before the law in the disbursements of the benefits of law."¹⁰¹

It has been argued that at the university level religious practices such as compulsory chapel, credit courses in specific religions, departments of religion, and permission of religious groups to use state university facilities¹⁰² can be distinguished from such practices at the elementary

⁹⁶ Johnson, *The Catholic Schools in America*, 165 ATLANTIC MONTHLY 500, 504 (1940).

⁹⁷ Murray, *supra* note 82, at 35.

⁹⁸ *Id.* at 38.

⁹⁹ MAYNARD, *THE CATHOLIC CHURCH AND THE AMERICAN IDEA* 236 (1953).

¹⁰⁰ Mitchell, *Religion and Federal Aid to Education*, 14 LAW & CONTEMP. PROB. 113, 135 (1949). Here Mr. Mitchell is setting forth a viewpoint of Rev. Wm. McManus of NCWC.

¹⁰¹ Costanzo, *supra* note 34, at 37.

¹⁰² For a list of specific practices at various state universities consult Burke, *Ten Hours of Credit in the Supernatural*, 90 AMERICA 149 (1953); also consult *Christian and Public Schools*, 40 PHI DELTA KAPPAN 302 (1959).

school level since attendance at the university level is not compulsory, courses in religion are optional, there is not divisiveness in view of the size of the institution, and since the students are mature there is an atmosphere of critical inquiry.¹⁰³ A distinction has also been drawn between young and more mature students on the basis of the suspicion of parents that their impressionable students are being indoctrinated rather than being given the facts.¹⁰⁴ However, Justice Frankfurter has said: "The Constitution does not give a greater veto power . . . when dealing with grade school regulations than with college regulations that offend conscience."¹⁰⁵

Federal funds are available on long term loans to denominational colleges for the purpose of building classrooms, cafeterias, dormitories, and other facilities owned and operated by churches under the College Housing Loan Program.¹⁰⁶

A United States governmental agency is authorized to award scholarships for scientific study at private, including religious, institutions.¹⁰⁷

The National Defense Education Act of 1958 under subchapter II makes available to nonprofit as well as public institutions funds from which students attending denominational schools may borrow up to \$1,000.00 per year to finance their college educations.¹⁰⁸ Under subchapter III funds are also made available for loans to private nonprofit elementary and secondary schools for acquiring equipment to be used in teaching science, mathematics or foreign languages.¹⁰⁹ Under subchapter IV National Defense Fellowships are awarded with no stipulation that attendance be only at public colleges.¹¹⁰ Under subchapter VII grants-in-aid may be made to nonprofit private organizations for research and experimentation in television, radio, and motion pictures related to school operation.¹¹¹ The Act is concerned with the fullest development of the technical skills and resources of all the nation's young men and women, whether in attendance at public or

¹⁰³ KAUPER, LAW AND PUBLIC OPINION, RELIGION AND THE STATE UNIVERSITY 69 (1958).

¹⁰⁴ SUTHERLAND, *op. cit. supra* note 79, at 47.

¹⁰⁵ West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 648 (1943) (dissenting opinion).

¹⁰⁶ 12 U.S.C.A. § 1749 (Supp. 1959) (College Housing Amendments of 1955); 12 U.S.C.A. § 1749 c (Supp. 1959).

¹⁰⁷ 42 U.S.C.A. § 1869 (Supp. 1959).

¹⁰⁸ 20 U.S.C.A. § 421 (Supp. 1959).

¹¹⁰ 20 U.S.C.A. § 461 (Supp. 1959).

¹⁰⁹ 20 U.S.C.A. § 441 (Supp. 1959).

¹¹¹ 20 U.S.C.A. § 541 (Supp. 1959).

private schools, in the interests of national defense. The United States Commissioner of Education did not see a violation of the principle of Church and State, nor an aid to the school in that portion of the act which authorized the U.S. Office of Education to pay for academic testing in nonpublic schools, where the state does not have the authority; but he rather viewed it as an attempt to identify students for guidance purposes so as to reduce the large loss of talent.¹¹²

Health, emotional stability, and literacy come more and more to be recognized as community assets in which government has a vital concern. These assets should be developed and not simply ignored as far as private schools are concerned because parents exercise their constitutional right to send their children to religious schools.¹¹³ Programs promoting these matters of vital concern when set up in religious schools leave the state and children as beneficiaries, and the religious schools only benefit incidentally.

On the federal level we have the National School Lunch Act,¹¹⁴ designed to promote the health of the nation's children and to encourage domestic consumption of nutritious agricultural products through grants-in-aid, matched by the states, to nonprofit school lunch programs. Where the state is prohibited by its constitution from disbursing aid to private schools, a federal administrator is authorized to disburse the funds directly to the private school in proportion to the school population as compared to total school population, providing that any such payment be matched. This act is a child welfare benefit on the same par with bus service and health benefits. It cannot be said to be aid to the parochial school.

The National Youth Administration Program of 1935 was designed to assist the child in getting through school, whether secular or sectarian, by paying him small sums of money earned while working in and about the school.¹¹⁵

The National Welfare Conference on behalf of the Roman Catholic Bishops in the United States issued the following statement on November 19, 1955:

What then is the place of private and church-related schools in America? Their place is one dictated by nothing more than justice and equity and accorded the recognition of their worth. They have, we repeat, full right to be considered and

¹¹² 40 PHI DELTA KAPPAN 317 (1959).

¹¹³ Smith, *Aid to Private and Parochial Schools*, 96 AMERICA 155 (1956).

¹¹⁴ 42 U.S.C.A. § 1759 (Supp. 1959).

¹¹⁵ Exec. Order 7086 (June 26, 1935).

dealt with as components of the American educational system. They protest against the kind of thinking that would reduce them to a secondary level, and against unfair and discriminatory treatment which would, in effect, write them off as less wholly dedicated to the public welfare than the state supported school. The students of these schools have the right to benefit from those measures, grants or aids which are manifestly designed for the health, safety and welfare of American youth, irrespective of the school attended.¹¹⁶

That the federal government has viewed the health of all its citizens on a nonreligious basis is seen from the Hospital Survey and Construction Act of 1946, along with its amendments,¹¹⁷ designed to assist in the construction of both public and private nonprofit hospitals. The federal contribution toward construction of a hospital owned and operated by a religious order may run as high as two-thirds of the cost. Facilities must be furnished patients without discrimination on account of creed and needed hospital facilities must be furnished to persons unable to pay for them. The Health Research Facilities Act of 1956¹¹⁸ provides for grants-in-aid on a matching basis to public and nonprofit institutions up to fifty per cent of cost, to assist in constructing facilities for research in science related to health. Financial assistance from funds available for Indian health facilities may be provided to private groups where it is determined that financial assistance is more desirable than federal construction.¹¹⁹

Both on a state and federal level there is a considerable amount of legislation exempting religious organizations and their employees from labor legislation and taxation. Service performed as a member of a religious order is not employment subject to tax under the Old Age and Survivors section of the Social Security Act.¹²⁰ Service as an employee of a religious group does not come within the Unemployment Compensation section of the Act.¹²¹ Were employees covered in these two situations the employer—the religious corporation—would be under obligation to pay taxes. Workmen's Compensation Acts in many cases exclude religious organizations on the ground that they are non-

¹¹⁶ U.S. News & World Report, Dec. 2, 1955, p. 104.

¹¹⁷ 60 Stat. 1041 (1946), as amended, 42 U.S.C.A. § 291 (Supp. 1959); 72 Stat. 616 (1958), 42 U.S.C.A. 291d (Supp. 1959).

¹¹⁸ 42 U.S.C.A. §§ 292, 292e (Supp. 1959).

¹¹⁹ 42 U.S.C.A. §§ 2005, 2005 (c), 2005 (e) (Supp. 1959).

¹²⁰ 60 Stat. 978 (1935), as amended, 42 U.S.C.A. § 410 (8A) (Supp. 1959).

¹²¹ 26 U.S.C.A. § 3306 (c) (8) (Supp. 1959).

profit organizations.¹²² State Labor Relations Acts have been held inapplicable to charitable hospitals.¹²³ Fair Employment Practice Acts do not include employees of religious institutions, this on the ground that it would be unfair to compel religious organizations to hire members of other church groups.¹²⁴

A host of tax exemptions, deductions, and credits have been granted on both state and federal levels on such bases as *de minimis*; to tax churches would divert money from a higher to a lower use; tax exemption promotes the moral and social welfare of society; and the religious institution is a not-for-profit organization entitled to the same consideration as any charitable organization.¹²⁵ If exemptions are granted to nonreligious charitable organizations they should be granted to similar religious organizations to avoid restraining the free exercise of religion.¹²⁶ On a state level there is exemption from real estate and personal property taxation for such things as houses of worship and lands, personalty devoted to religious uses, cemeteries, property of religious schools and colleges under clauses applicable to charitable organizations, residences of ministers, property employed in the publication of religious tracts, private libraries of ministers, religiously owned property used for entertainment and recreational purposes, religious camp meeting grounds, sales to religious institutions, and admissions taxes.¹²⁷ Inheritance, estate, and gift taxes do not apply to religious groups; religious corporations pay no federal income taxes; corporate and individual taxpayers are allowed deductions for religious contributions; and the rental value of a minister's home is not included in his gross income.¹²⁸

Preferential rates on second and third class mail go to religious, educational, scientific, philanthropic, agricultural, labor, veterans, and fraternal organizations or associations organized on a not-for-profit

¹²² Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation*, 14 LAW & CONTEMP. PROB. 144, 156 (1949).

¹²³ *Id.* at 157.

¹²⁴ *Id.* at 158.

¹²⁵ PFEFFER, CHURCH, STATE, AND FREEDOM 185 (1953).

¹²⁶ Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 432 (1953).

¹²⁷ Consult Van Alstyne, *Tax Exemption of Church Property*, 20 OHIO ST. L.J. 461-507 (1959), for church activities exempt from state taxation.

¹²⁸ For a comprehensive list of tax benefits, exemptions, and deductions consult Note, 49 COLUM. L. REV. 968 (1949); also consult Comment, 5 VILL. L. REV. 255 (1959-60).

basis.¹²⁹ Here the religious group is treated as other nonprofit organizations, and to deny it lower mailing rates would be to discriminate against it because of its religious nature.

Certainly no form of more direct aid to religion can be noted than is found in the federal statute which provides for payment of compensation to the Senate chaplain at the rate of \$5,000.00 per year.¹³⁰ Senate rules provide that senators take an oath ending with "So help me God,"¹³¹ and that the chaplain open each day's session with a prayer.¹³² House rules also provide that each day's session be opened with prayer.¹³³ Since the Protestant majority would always have the power to install a Protestant chaplain, would not the government, besides directly aiding religion by paying a salary to the chaplain, be lending its powers to the preference of the Protestant majority over the Catholic and Jewish minorities? This differs from government support of chapels and chaplains in prisons, hospitals, detention homes, and the armed forces where the failure to provide proper means of worship for persons whose freedom of movement is restricted would amount to denial of freedom of religious worship.¹³⁴

The United States Military Academy at West Point insists upon chapel attendance.¹³⁵ The chaplain conducts prayers before breakfast,¹³⁶ and attendance is mandatory at Sunday church services at the Naval Academy at Annapolis.¹³⁷ The sum of \$500,000.00 was appropriated by Congress to construct a chapel at the Merchant Marine Academy in Kingsport, New York.¹³⁸ In this field the government, while neutral toward individual religious groups, prefers religion over irreligion and uses coercive means at the naval and military academies to give effect to that preference.

Consular relations with the Papal States lasted from 1797 to 1870 with the approval of Congress. Diplomatic relations with the Papal

¹²⁹ 65 Stat. 672 (1951), as amended, 39 U.S.C.A. § 289a (Supp. 1959); 65 Stat. 673 (1951), as amended, 39 U.S.C.A. § 290a (Supp. 1959).

¹³⁰ 2 U.S.C.A. § 61d (Supp. 1959).

¹³¹ S. Doc. No. 14, 86th Cong., 1st Sess., Rule II, at 2 (1959).

¹³² *Id.* Rule III, at 3.

¹³³ H.R. Doc. No. 458, 85th Cong., 2d Sess., Rule VII, at 318 (1959).

¹³⁴ Katz, *supra* note 126, at 429.

¹³⁵ U.S. MILITARY ACADEMY CATALOGUE (1960-61) at 89 (1960).

¹³⁶ U.S. NAVAL ACADEMY REGULATIONS, art. 0901.1e (1958).

¹³⁷ U.S. NAVAL ACADEMY REGULATIONS, art. 0901.1a and art. 0901.1b (1958).

¹³⁸ 62 Stat. 172 (1948).

States lasted from 1848 to 1868 as proposed by the President and approved by Congress.¹³⁹ Recognition here was extended not to a religion as such but to a nation with an established religion.

The District of Columbia recognizes, encourages, and favors religion in numerous ways. The superintendent at the National Training School for Boys is authorized to apply such discipline as will secure "in . . . [the boys] fixed habits of religion."¹⁴⁰ Water is supplied free of charge to all schools.¹⁴¹ Tax exemption is granted to buildings owned by religious corporations including ministers' residences.¹⁴² Religious corporations are exempted from the District of Columbia Income Tax.¹⁴³ The rental value of ministers' dwelling houses is also exempt.¹⁴⁴ Employees of religious organizations are exempt from the Unemployment Compensation Act.¹⁴⁵ Ministers of gospel are exempt from jury service.¹⁴⁶ In placing a child under guardianship the court chooses a guardian of like religious faith with the parent.¹⁴⁷

Wearing of religious garb while teaching in public schools, has occasioned some litigation on the state level, some courts holding this has a propagandizing effect, and others saying that to deny nuns the right to teach because of their religious dress would violate their civil rights.¹⁴⁸ The question has never reached the Supreme Court, but when it does, the Court may very well follow its holding that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."¹⁴⁹ A religious test cannot be required to qualify for public office.

The President's annual Thanksgiving Day Proclamation, "In God We Trust" on our coins and dollar bills, "In God is our Trust" in our National Anthem, "So help me God" as part of the oath of office of the President and of the oath of witnesses, and "one nation under God" in our pledge of allegiance all certify to the fact that we are a religious people. Schools and government offices close on Christmas and Thanksgiving. New York City recently closed its schools for two

¹³⁹ Burke, *Buses, Released Time and the Political Process*, 32 MARQ. L. REV. 179, 184 (1948-49).

¹⁴⁰ D.C. Code, § 32-811 (1951).

¹⁴⁴ D.C. Code, § 47-1557a (b) (6) (1951).

¹⁴¹ D.C. Code, § 43-1533 (1951).

¹⁴⁵ D.C. Code, § 46-301 (b) (5) (g) (1951).

¹⁴² D.C. Code, § 47-801a (o) (1951).

¹⁴⁶ D.C. Code, § 11-1420 (1951).

¹⁴³ D.C. Code, § 47-1554 (d) (1951).

¹⁴⁷ D.C. Code, § 11-918 (1951).

¹⁴⁸ *Wearing Religious Garb*, 1 CATHOLIC LAW. 62 (1955).

¹⁴⁹ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

days when the Jewish New Year was observed. The decision was based on administrative reasons, because large numbers of Jewish teachers would be absent on that day.¹⁵⁰ It would have been just as well to justify the closing as recognition of a tradition expressing the religious wish and feeling of a large segment of our people. When the school authorities do not schedule classes on Saturdays and Sundays are they not recognizing that these are Holy Days? "A common-sense interpretation of the establishment clause can accommodate the incidental, the ceremonial, and the traditional connection between church and state."¹⁵¹

CONCLUSION

We can only conclude that the wall of separation is permeable, lacks definite boundaries, and is of uncertain height. Time, place, circumstances, and subject matter determine what degree of separation there shall be. There are areas where none will deny that the maximum degree of separation is best for all. There are areas where separation is unnecessary, undesirable, or impossible. We must agree that:

In our life and government we are so enmeshed in religious concepts that the effort to dissociate completely religious observances and governmental functions is doomed to failure. It is like trying to produce chemically pure water. You can distill it and redistill it and redistill it again and there still will be a trace of calcium in it.¹⁵²

Recently two women school guards were seen in a city owned car with a religious statue on the dash board. Protests were registered to the display of a religious object in a government owned vehicle. The city promised that such practices would be discontinued.¹⁵³ This extreme in insisting upon the elimination of an innocuous practice which gave comfort to some, and hardly more than minimal discomfort to others, makes one sympathize with the character in the following:

Said the physicist mounting his bicycle,
 "I've discovered the ultimate particle.
 The thing is so small,
 It's not there at all,
 And can't be described in an article."¹⁵⁴

¹⁵⁰ The New World, May 6, 1960, p. 3, col. 1.

¹⁵¹ PRITCHETT, THE AMERICAN CONSTITUTION 486 (1959).

¹⁵² SUTHERLAND, PUBLIC AUTHORITY AND RELIGIOUS EDUCATION IN STUDY OF RELIGION IN THE PUBLIC SCHOOLS 33, 71 (Brown, N.C. ed. 1957).

¹⁵³ The New World, Jan. 1, 1960, p. 21, col. 7.

¹⁵⁴ Schenck, *Well, That's That*, Harper's Magazine, March 1959, p. 48.